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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 459

JONES OIL COMPANY and TREVLYN OIL COMPANY,
Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; SOCONY MOBIL OIL COMPANY, INC., TEXACO, INC., PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, SCHERMERHORN OIL CORPORATION, THE HEFNER COMPANY, BEARD OIL COMPANY and KERR-McGEE OIL INDUSTRIES, INC.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANCIS IRVINE,
Republic Building,
Oklahoma City, Oklahoma,
Attorney for Respondent,
Kerr-McGee Oil Industries, Inc.;

R. A. HUFFMAN,
LUPARDUS, HOLLIMAN & HUFFMAN,
Oklahoma Natural Building,
Tulsa, Oklahoma,
Attorney for Respondent,
Schermerhorn Oil Corporation;

FISHER AMES,
219 Couch Drive,
Oklahoma City, Oklahoma,
Attorney for Respondent,
Texaco, Inc.;

WM. J. ZEMAN,
LLOYD G. MINTER,
Phillips Building,
Bartlesville, Oklahoma,
CECIL HAMILTON,
Oklahoma Mortgage Building,
Oklahoma City, Oklahoma,
Attorneys for Respondent,
Phillips Petroleum Company;

GORDON WATTS,
P. O. Box 7008,
Oklahoma City, Oklahoma,
Attorney for Respondent,
Shell Oil Company;

ROBERT A. HEFNER, JR.,
720 N.W. 50th Street,
Oklahoma City, Oklahoma,
Attorney for Respondent,
The Hefner Company;

FERRILL H. ROGERS,
Capitol Office Building,
Oklahoma City, Oklahoma,
Attorney for Corporation Commission of the State of Oklahoma;

ROBERT W. RICHARDS,
P. O. Box 1828,
Oklahoma City, Oklahoma,
Attorney for Socony Mobil Oil Company, Inc., Operator of the Tatums Field Unit.

Of Counsel:
C. B. WALLACE,
ROSS MADOLE,
Socony Mobil Oil Company, Inc.,
Dallas, Texas.

October, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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Under the Conservation laws of the State of Oklahoma the Respondents and many other oil and gas lessees, with the approval of the Oklahoma Corporation Commission, formed the Tatums Field Unit in order to recover an estimated additional 22,500,000 barrels of oil by unitized secondary recovery operations—oil which will otherwise remain underground because it cannot be recovered by primary production methods. The two Petitioners, who own oil and gas leases covering only 150 acres out of the unit area of 2,750 acres, have opposed the creation of this unit.

This Plan of Unitization, prior to presentation to the Oklahoma Corporation Commission, was approved by 83.3358 per cent of the lessee operators and 72.51116 per cent of the royalty owners in the unit area. The two Petitioners were the only parties, either lessees or royalty owners, who appeared before the Corporation Commission to oppose creation of this secondary recovery project. The unitization statute of Oklahoma requires that 63 per cent of the lessees and a similar percentage of the royalty owners approve any Plan of Unitization before it can be effective—only then can the Corporation Commission order approving the Plan and creating the Unit become operative: 52 Oklahoma Statutes 1961, Sections 287.1 to 287.15, incl. (52 Okla. Stat. Ann. 287.1 to 287.15, incl.).

In this connection it should be noted that the royalty owners under the Petitioners' oil and gas leases overwhelmingly approved this Plan of Unitization. The Petitioners own oil and gas leases covering three tracts which are designated in Exhibit "A" (R. 275), attached to the Plan of Unitization herein, as Tract No. 48 (40 acres—Trevlyn Oil Company—an undivided one-half interest), Tract No. 60 (80 acres—Jones Oil Company), and Tract No. 75 (56 acres—Trevlyn Oil Company). Ninety-nine per cent of their royalty owners in Tract No. 48 approved and executed the Plan of Unitization, approximately 70 per cent in Tract No. 60, and 75 per cent in Tract No. 75.

Contrary to the implication of the Petition herein this project is not dominated by Socony Mobil Oil Company, Inc., the "large integrated oil company" or by any other one operator lessee. Mobil has been designated as operator

of this secondary recovery project and as such acts on behalf of all lessees owning oil and gas leases in the unit area. It can be removed as operator by the other lessees if they should so desire to do so. Actually Mobil owns leases covering only approximately 27 per cent of the unit area. The interest of each of the numerous lessees in the unit is shown in Exhibit "B" attached to the Plan of Unitization (R. 276).

A brief history of this oil field may be of assistance to this Court since this case involves the presently pressing matter of state conservation laws and practices in the production of oil. Production in this particular field was originally found in 1927 and a total of 275 producing wells have been drilled. Some of the wells produced from one sand but 61 wells produced from two or three sands. Where more than one sand was productive all production was commingled in the well bore, i.e., none of the wells were dually or triply completed so that each sand could be separately produced. This was the condition existing when a group of the lessee operators in the field concluded, in view of the inevitable approach of the economic limits of production by primary methods, that a study should be made to determine the feasibility of unitized secondary recovery operations of these sands under the appropriate laws of Oklahoma, in order to produce that oil which would not be produced by primary methods and thus remain in the ground. In addition to Socony Mobil, Texaco, Inc., Phillips Petroleum Company, The Hefner Company, Kerr-McGee Oil Industries, Inc., Schermerhorn Oil Corporation, and Shell Oil Company (named parties in this action) other lessee operators participated in the engineering, geological

and operational studies. Among them were Rocket Oil Company, Miles Jackson, Hales Oil Interests, Wichita River Oil Company, Humble Oil & Refining Company; C. L. McMahan, Inc., Jake L. Hamon, J. M. Thompson, Jr.; Beard Oil Company; and Cox & Hamon.

After more than four years of study by petroleum engineering, geological and operating personnel representing the various lessee operators, this Plan of Unitization was formulated. During this period the record reflects that neither of the Petitioners sent representatives to the study group, whose meetings were known to all, and the minutes of such meetings were circulated to all lessee operators of record. Neither did they furnish any geological, engineering or production data.

After this Plan of Unitization for secondary recovery operations was formulated and the unit area delineated it was submitted to all of the lessee operators and royalty owners of record and, as stated above, 83.3358 per cent of the former and 72.51116 per cent of the latter approved it by executing the same. Then the Plan was submitted to the Oklahoma Corporation Commission as required by the laws of Oklahoma, *supra*. The application was filed by Socony Mobil Oil Company, Inc., as the formal applicant, but Texaco, Inc., Texaco Seaboard, Inc., Phillips Petroleum Company, Schermerhorn Oil Company, Kerr-McGee Oil Industries, The Hefner Company, Rocket Oil Company, Wichita River Oil Company, Beard Oil Company, Hales Oil Interests, and Shell Petroleum Company all entered their appearances in support of the application at the hearing before the Corporation Commission.

After approval of the Plan and creation of the Tatums Field Unit by the Corporation Commission these Petitioners appealed to the Oklahoma Supreme Court which affirmed the order of the Commission. Before the latter court the Petitioners' principal complaint was that the Oklahoma statutes, *supra*, did not authorize the unitization of three geologically separate sands for secondary recovery purposes. The Oklahoma Supreme Court considered this contention as well as the others made by Petitioners and held not only that the statute permitted creation of such a unit but that to hold otherwise would violate the very reasons for unitization.

With respect to the constitutionality of the order approving this Plan of Unitization for secondary recovery operations and creating this Tatums Field Unit, the Oklahoma Supreme Court in its opinion, 332 P.2d 751, 755, said:

> "We think these questions have been before us and decided adversely to protestants' contentions in Palmer Oil Corp. v. Phillips Petroleum Co., 204 Okla. 543, 231 P.2d 997, certiorari denied, Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 72 S.Ct. 842, 96 L.ed. 1022; Speirs v. Magnolia Petroleum Co., 206 Okla. 503, 244 P.2d 843; Woody v. State Corporation Commission, 265 P.2d 1102.
>
> "It clearly appears from the evidence in this case that the waterflooding (secondary recovery) under this Unitization Plan the *protestants* will recover far more oil than they would from primary recovery."

The court then quoted Article IX, Section 20 of the Oklahoma Constitution which requires the Supreme Court to "exercise its own independent judgment as to both the

law and the facts" where an appeal involves an asserted "violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma" and concluded:

> "We have exercised our independent judgment as to both the law and the facts in this case and we think the Corporation Commission should be affirmed."

Since the Petitioners at no time made a supersedeas bond staying the order of the Commission or the mandate of the Oklahoma Supreme Court, Socony Mobil, as operator, and the Operators Committee of the Tatums Field Unit, proceeded to take over the Unit Area for secondary operations on behalf of all parties in accordance with the Plan of Unitization and the order of the Oklahoma Corporation Commission.

Each time the Oklahoma Unitization Statute has been challenged as unconstitutional in this Court writ of *certiorari* has been denied and the appeal dismissed. *Palmer Oil Co. v. Amerada Petroleum Corporation, et al.* (consolidated with *Kit C. Farwell v. Amerada Petroleum Corporation, et al.*), 231 P.2d 997, *certiorari denied*, 343 U.S. 390, 96 L. Ed. 1022, 1026, 72 S. Ct. 842; *Stanolind Oil & Gas Co. v. West Edmond Hunton Lime Unit*, 193 F.2d 818, *certiorari denied*, 343 U.S. 920, 96 L. Ed. 1333.

In the first case (*Palmer Oil Co. v. Amerada Petroleum Corporation, supra*) this Court in a Per Curiam opinion said:

> "In the light of our previous decisions; appellants have failed to raise any substantial federal questions and the appeals are therefore dismissed. Cities Service

Gas Co. v. Peerless Oil & Gas Co., 340 US 179, 95 L. ed. 190, 71 S. Ct. 215 (1950); Railroad Com. of Texas v. Rowan & Nichols Oil Co., 311 US 570, 85 L. ed. 358, 61 S. Ct. 343 (1941); Railroad Com. of Texas v. Rowan & Nichols Oil Co. 310 US 573, 84 L. ed. 1368, 60 S. Ct. 1021, as amended 311 US 614, 615, 85 L. ed. 390, 61 S. Ct. 66 (1940); Patterson v. Stanolind Oil & Gas Co. 305 US 376, 83 L. ed. 231, 59 S. Ct. 259 (1939); Home Bldg. & Loan Asso. v. Blaisdell, 290 US 398, 435-437, 78 L. ed. 413, 427-429, 54 S. Ct. 231, 88 ALR 1481 (1934); Champlin Refining Co. v. Corporation Commission, 286 US 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 ALR 403 (1932)."

As indicated in the Per Curiam opinion, *supra*, the two foregoing cases involved the original Oklahoma Unitization Statute enacted in 1945. This was superseded by the present statute, *supra*, which was enacted in 1951. The two are substantially the same except that the latter requires notice to and approval by royalty owners as well as lessee operators. The Oklahoma Supreme Court in *Woody* v. *State Corporation Commission*, 265 P.2d 1102, upheld the constitutionality of the 1951 statute, which is questioned herein, saying (page 1104):

"A comparison of the foregoing Act (1951) with the Unitization Act of 1945, House Bill 339 of the 1945 Legislature, Tit. 52 O.S. Supp. 1947 §§ 286.1 to 286.17 discloses that they are comparable in their material provisions. Under the Act of 1945, the oil and gas *lessees were the sole arbiters* to authorize and provide for unitization, management, operation and development of oil and gas properties to which the Act was applicable, *while under the present Act (1951) here involved, royalty owners, as well as the lease owners, must approve the Unitization agreement* prior to the

Commission's order establishing the same. The constitutionality of the former (1945 Act) has been upheld by this court in the following cases: Palmer Oil Corp. v. Phillips Petroleum Co., 204 Okl. 543, 231 P.2d 997, certiorari denied, Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 72 S. Ct. 842, 96 L. ed. 1022; Spiers v. Magnolia Petroleum Co., 206 Okl. 503, 244 P.2d 843.

"In the Palmer case the minority of the court were of the view that 'much less should it be necessary for the State to authorize a majority group of lessees to take over the operations of other lessees, to the objection and detriment of minority lessees, and over the objection of *all* royalty owners.' (204 Okl. 543, 231 P.2d 1020.) These objections have been removed by the repeal of the 1945 Unitization Act and the substitution of the 1951 Unitization Act, which latter Act requires notice to and approval of the unitization agreement by royalty owners, as well as lessee owners." (Emphasis supplied.)

In the foregoing case the protestants also contended the order approving the Plan and creating the unit was unconstitutional for substantially the same reasons advanced herein, including that the participation formula which allocated the oil produced by unit wells to the various separately owned tracts was inequitable and deprived them of their property in violation of the state and federal Constitutions.

Referring, in the above case, to this last contention, the Oklahoma Supreme Court first said (p. 1105):

"*We are of the view that the Unitization Act of 1951 requiring notice to and consent of royalty owners on*

a comparable basis with lease owners have placed the Act beyond any challenge on constitutional grounds.

"This court has held that the Legislature may curtail individual freedom in the public interest, and where the Legislature has made its choice as to the method and manner of the control, its choice is not subject to restraint, unless its application and enforcement impinges upon constitutional guarantees. Neither has the court the power or authority to resolve its doubts, whether the remedy adopted is as efficacious as many believe, or is not as good as some other plan or scheme suggested, or is better even than the blind operation of uncontrolled econonfic forces. Our duty ceases when we draw a line somewhere between opposing and conflicting abstract principles. Our duty is to decide—not to debate." Emphasis supplied.

Both the Oklahoma Supreme Court and this Court have recognized that evidence relating to the characteristics and performance of oil reservoirs far below the surface of the earth involves "incalculable variants," complexities, and inferences and opinions by technical experts, and that such evidence is best evaluated by the administrative agency charged with the duty of administering the conservation laws. This Court, in *Railroad Commission of Texas v. Rowan*, 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368, 1373, expressed it in the following language, which was adopted by the Oklahoma Court in *Deeper Producing & Refining Co. v. State*, 199 Okla. 171, 184 P.2d 961:

"* * * such cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. * * *"

"A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.

"* * * Certainly, in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. * * *"

The foregoing aptly expresses the situation in secondary recovery unitization projects where the petroleum engineers and geologists have evaluated all of the available production and technical data and have formulated a plan for submission to the administrative tribunal. As the principal technical witness for the Respondents, Mr. Rod McIvor, who participated in the group studies as consultant of Rocket Oil Company, testified no one could state that each cubic foot of sand in the entire unit reservoir would contribute exactly the same, but that the contribution to the unit, while different, "all would be on the same order of magnitude (R. 92), and that there was not a tract in the unit area which would not contribute in some way to the waterflooding (secondary recovery operation) of the unitized reservoir (R. 101). With respect to so-called edge leases (along the unit's boundary), these would definitely contribute to the unit because they could be used for water injection wells and also to recover oil which otherwise

would be driven beyond the unit boundary by the waterflooding (R. 121).

Mr. McIvor further testified that it was impossible to make a quality correction in the participation formula for each "particular piece of rock" for the simple reason that ". . . we don't have the whole reservoir up on top of the ground to look at it, we are obliged to say that they are similar enough that we will treat them quality-wise and we will give them each acre foot as nearly as we can tell, the same credit" (R. 119, 120). He further expressed the opinion that the participation formula in the Plan of Unitization gave fair and equitable treatment to all because "under the existing conditions, the information which was available, the data and control that we had, we have used the best measuring stick of remaining waterflood reserves by using acre feet" (R. 122).

With respect to the conflict which may arise between conservation and individual rights, the Oklahoma Supreme Court in *Denver Producing & Refining Co. v. State, supra*, said at page 964:

> "* * * In most instances it is impossible to use a formula which will apply equally to all persons producing from a common source. In striking a balance between conservation of natural resources and protection of correlative rights, the latter is secondary and must yield to a reasonable exercise of the former. * * * The Commission has the power and is charged with the duty of conserving gas and oil resources. * * * Perhaps the Commission could have applied a formula which would have resulted in a greater equality and less inequity but the court must not substitute its no-

tion of expediency and fairness for that which guided the Commission to whom the formulation and execution of policy have been entrusted."

Some of the testimony of the Petitioners' technical witness Mr. Shih, who had never attended a single meeting of the lessees' technical study group during the more than four years of study, discloses why the Oklahoma Corporation Commission accepted the testimony of Mr. McIvor, Respondents' witness, and ordered creation of the unit.

Q. "Have you, in your own mind, reached any conclusion as to what you figure the weight should be or how the acre feet should be weighed in a formula?

A. No, I haven't exactly figured it, but based on what I have seen, I don't think it should get as much as 100 percent" (R. 179).

and

Q. "Am I correct that your testimony here has been primarily based upon the data and information from the report which was furnished Trevlyn by this (lessee operators' study group) committee? (Parenthetical explanation supplied.)

A. That is right.

* * * * * * *

A. Well, I never attended any committee meeting and I don't know how they worked really on this particular job" (R. 184).

and

Q. "You understood, of course, that that report was merely a feasibility report and being circulated among the operators and that nothing was to be done until the Operating Committee authorized

the same to be done, if, and when a plan of unitization was approved, did you not?

A. No, I did not realize that report was prepared entirely for the purpose of economic feasibility, and I depended on this report. I used it upon my engineering study" (R. 185).

and

Q. "(Mr. Rogers, Commission attorney) Looking at this problem from information that the Commission needs, are you under the opinion that this field should be unitized or should not be?

Q. Well, I think for any waterflood project, unitized operation is a much more and easier operation and efficient. My question is whether the Unit should come across this section line or not. That's my question" (R. 195-196).

and

Q. "(Mr. Rogers, Commission attorney) Of course the Commission is vitally interested in providing for the greatest ultimate recovery from any reservoir. Do you have any recommendation to the Commission that you think might possibly be a fair and equitable plan?

A. Well, I cannot offer anything other than what I have already said to divide it, but if the Commission has to either accept or reject the proposed Unit as a whole, I don't know . . . actually, I think to flood the three sands at one time, I think it would affect actually lowered efficiency of flooding than this the Tatums Sand alone. * * *" (R. 197-198).

and

Q "At the Engineering or Operators Committee hearings, did the opposition, we'll say for lack of a

better term, to the Unit plan offer any plan in the Engineering or Operating Committee meetings?

A. You say, did they offer any alternate?

Q. That's right, to the participation factor?

A. Well, by reading the minutes.

Q. You don't know personally?

A. No, I never attended a meeting, but in the minutes there were some other formulas offered" (R. 199-200).

Ironically, under the participation formula in the plan herein, which Petitioners contend is inequitable and unjust, they will receive more oil from the unit production allocated to their three tracts as primary recovery than they would in the absence of unitization. In addition thereto they will receive slightly less than 10 per cent of the estimated 22,500,000 barrels of secondary recovery oil, and this they would never recover in the absence of efficient secondary operations as in unitization.

Petitioners emphasize (Petition, p. 6) that they have been "compelled to pool" their production. It is true that unitization forces pooling in the interest of conservation and recovery of additional oil which could not be produced by primary operations, but the Spacing and Drilling Statute of Oklahoma (52 O.S. 1961, Sec. 87.1) also forces pooling of production, and this Court has held that statute to be constitutional. *Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83, appeal dismissed, 59 S.Ct. 259, 305 U.S. 376, 83

L. Ed. 231; *Anderson-Prichard Oil Corp. v. Corporation Commission*, 241 P.2d 363, appeal dismissed, 72 S. Ct. 562, 342 U.S. 938, 96 L. Ed. 698; *Anderson v. Corporation Commission*, 327 P.2d 699, appeal dismissed, 79 S. Ct. 536, 358 U.S. 642, 3 L. Ed. 567.

CONCLUSION

Before concluding Respondents wish to state they have been advised that, while the Oklahoma Corporation Commission concurs in this response, the latter also desires to respond separately setting forth why that state administrative agency believes its order herein approving this Plan of Unitization and creating the Tatums Field Unit should be sustained as the Oklahoma Supreme Court has done. On account of later service of the petition herein upon the Commission, however, its time to respond does not expire until a later date.

It is respectfully submitted that the Petition for Writ of Certiorari herein should be denied.

FRANCIS IRVINE,
Republic Building,
Oklahoma City, Oklahoma,

Attorney for Respondent,
Kerr-McGee Oil Industries, Inc.;

R. A. HUFFMAN,
LUPARDUS, HOLLIMAN & HUFFMAN,
Oklahoma Natural Building,
Tulsa, Oklahoma,

Attorney for Respondent,
Schermerhorn Oil Corporation.

FISHER AMES,
219 Couch Drive,
Oklahoma City, Oklahoma,

Attorney for Respondent,
Texaco, Inc.;

WM. J. ZEMAN,
LLOYD G. MINTER,
Phillips Building,
Bartlesville, Oklahoma,

CECIL HAMILTON,
Oklahoma Mortgage Building,
Oklahoma City, Oklahoma,

Attorneys for Respondent,
Phillips Petroleum Company;

GORDON WATTS,
P. O. Box 7008,
Oklahoma City, Oklahoma,

Attorney for Respondent,
Shell Oil Company;

ROBERT A. HEFNER, JR.,
720 N.W. 50th Street,
Oklahoma City, Oklahoma,

Attorney for Respondent,
The Hefner Company;

FERRILL H. ROGERS,
Capitol Office Building,
Oklahoma City, Oklahoma,

Attorney for Corporation Commission of the State of Oklahoma;

ROBERT W. RICHARDS,
P. O. Box 1828,
Oklahoma City, Oklahoma,

Attorney for Socony Mobil Oil Company, Inc., Operator of the Tatums Field Unit.

Of Counsel:

C. B. WALLACE,
ROSS MADOLE,
Socony Mobil Oil Company, Inc.,
Dallas, Texas.

October, 1963.